

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-CA-00502-COA

**JAMES EARL TOBIAS, JR. AND TIFFANY
TOBIAS**

APPELLANTS

v.

**UNIVERSITY OF MISSISSIPPI MEDICAL
CENTER**

APPELLEE

DATE OF JUDGMENT: 03/28/2018
TRIAL JUDGE: HON. JEFF WEILL SR.
COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT,
FIRST JUDICIAL DISTRICT
ATTORNEY FOR APPELLANTS: ROBERT G. GERMANY
ATTORNEYS FOR APPELLEE: WALTER T. JOHNSON
SUSAN LATHAM STEFFEY
NATURE OF THE CASE: CIVIL - MEDICAL MALPRACTICE
DISPOSITION: AFFIRMED - 09/24/2019
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE J. WILSON, P.J., WESTBROOKS AND McDONALD, JJ.

J. WILSON, P.J., FOR THE COURT:

¶1. James Tobias was rushed to the University of Mississippi Medical Center (UMMC) after a forklift fell on his head. Four days later, while still being treated at UMMC, Tobias fell and allegedly hit his head. Tobias sued UMMC. He alleged that UMMC's nurses were negligent and that his fall caused additional injuries. The circuit court granted summary judgment for UMMC because Tobias failed to present any evidence that he sustained any injury as a result of the fall. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2. On October 30, 2013, James Tobias was injured at work when a two-ton forklift fell on his head and face. He was taken to UMMC and admitted to the surgical intensive care unit for trauma surgery services. Tobias's injuries were severe, including multiple fractures, a large epidural hematoma (bleeding between the skull and the outer membrane covering the brain), and optic nerve damage that resulted in permanent blindness.

¶3. On November 2, 2013, Tobias was extubated and transferred to a hospital room. Tobias's mother was sitting with him at his bedside. Around 2 a.m. on November 3, she reported that Tobias stood up from his bed and then fell to the floor and hit his head. Tobias was taken to radiology to check for new or worsening bleeding. The imaging showed the "expected evolution" of Tobias's epidural hematoma. Dr. Gustavo Luzardo performed a craniotomy to remove blood from the hematoma. Tobias was discharged from UMMC to begin rehabilitation on November 15.

¶4. Tobias later sued UMMC for medical malpractice. He alleged that the nursing staff at UMMC negligently failed to monitor him closely. He also alleged that the fall caused or contributed to his injuries. Tobias designated a nurse to testify as an expert regarding alleged breaches of the nursing standard of care. However, he did not designate an expert to testify that he was injured as a result of his fall. UMMC moved for summary judgment based on Tobias's failure to designate an expert who could testify regarding causation. In response, Tobias argued that expert testimony was unnecessary because his medical records were sufficient to establish causation. The circuit court granted UMMC's motion for summary judgment. Tobias filed a notice of appeal.

ANALYSIS

¶5. We review a decision granting or denying summary judgment de novo. *Hubbard v. Wansley*, 954 So. 2d 951, 956 (¶9) (Miss. 2007). The moving party is entitled to summary judgment if the record evidence “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” M.R.C.P. 56(c). The evidence is viewed in the light most favorable to the non-moving party. *Massey v. Tingle*, 867 So. 2d 235, 238 (¶6) (Miss. 2004). However, “[t]he non-moving party may not rest upon mere allegations or denials in the pleadings but must set forth specific facts showing that there are genuine issues for trial.” *Id.*

¶6. A prima facie case of medical malpractice requires proof of (1) the applicable standard of care, (2) a breach of the required standard, and (3) an injury proximately caused by the breach. *Norman v. Anderson Reg’l Med. Ctr.*, 262 So. 3d 520, 523 (¶12) (Miss. 2019). “As a rule, the plaintiff must demonstrate each of these elements through medical-expert testimony, and the expert must . . . establish that the breach was the proximate cause or the proximate contributing cause of the alleged injuries.” *Id.*

¶7. Tobias failed to present any expert testimony that UMMC’s alleged negligence proximately caused or contributed to any injury.¹ Tobias argues that expert testimony was unnecessary because (1) his medical records provide evidence of causation, and (2) this case falls within the “layman’s exception” to the rule that expert testimony is required. However,

¹ The nurse that Tobias designated as an expert did not opine as to causation, nor would she have been qualified to do so. *See Vaughn v. Miss. Baptist Med. Ctr.*, 20 So. 3d 645, 652-53 (¶¶20-21) (Miss. 2009) (holding that nursing experts cannot opine as to issues of medical causation).

both arguments are without merit.

¶8. First, we cannot agree with Tobias’s characterization of his medical records. Dr. Luzardo’s contemporaneous notes stated that Tobias’s post-fall CT “scan showed [the] expected evolution” of the epidural hematoma that was caused by Tobias’s original injury at work. Dr. Luzardo also stated that Tobias’s “significant intra and extra-axial hematomas” were “pre-existing” and had not, in Dr. Luzardo’s judgment, “changed due to the fall.” Dr. Luzardo further noted that Tobias “continue[d] to require stimulation to engage him, and follow commands, so [his] mental status remain[ed] impaired.” Tobias points to an entry in his records stating that a CT scan was ordered after his fall in order to “r/o” (i.e., rule out) any “new/worsening bleed.” However, that note was entered prior to Dr. Luzardo’s further examination of Tobias. Dr. Luzardo’s subsequent notes indicate that he did, in fact, rule out any new or worsening bleeding. Thus, nothing in the various entries in Tobias’s medical records establishes that his fall caused any new injury.²

² Tobias’s argument relies heavily on this Court’s decision in *City of Jackson v. Graham*, 226 So. 3d 608 (Miss. Ct. App. 2017). Tobias asserts that *Graham* holds that “it is not necessary to have expert testimony on the issue of medical causation” and that “medical records alone are sufficient” to establish causation. However, *Graham* was not a medical malpractice case, and it does not stand for either proposition. *Graham* was a Mississippi Tort Claims Act case in which the plaintiff sued the City of Jackson for injuries that she sustained when a police car crashed into her vehicle. *Id.* at 609-10 (¶¶1-5). There was no dispute that the plaintiff was injured in the car wreck, and there was no serious contention that she sought medical treatment for anything other than the accident. *Id.* at 613 (¶20). The only issue in *Graham* was whether the plaintiff needed expert testimony to connect her medical *bills* to her injuries. *Id.* at 613 (¶¶19-22). We held that no such testimony was necessary because, by statute, “[p]roof that medical, hospital, and doctor bills were paid or incurred because of any illness, disease, or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable.” *Id.* at 613 (¶19) (quoting Miss. Code Ann. § 41-9-119 (Rev. 1993); *Boggs v. Hawks*, 772 So. 2d 1082, 1085 (¶7) (Miss. Ct. App. 2000)).

¶9. In addition, UMMC submitted an affidavit from Dr. Luzardo regarding his treatment of Tobias. Dr. Luzardo stated that Tobias’s post-fall CT scan “showed the expected evolution of the large hematoma first seen on imaging” upon Tobias’s admission to the hospital. Dr. Luzardo stated that when he performed the craniotomy on Tobias, he found “congealed epidural hematoma” and “no evidence of blood of different age,” which confirmed that Tobias’s fall did not result in any new or worsened injury. Finally, Dr. Luzardo concluded, “to a reasonable degree of medical probability,” that Tobias did not sustain any new or worsened injuries as a result of his fall. Tobias submitted no affidavits or other evidence to contradict Dr. Luzardo’s affidavit.

¶10. Second, this case does not fit within the “layman’s exception” to the rule that causation in a medical malpractice case must be proved by competent expert testimony. Our Supreme Court has held that “a medical expert is not necessary in instances in which a layman can observe and understand *the negligence* as a matter of common sense and practical experience”—for example, “in cases involving foreign objects left inside patients or where patients were given the wrong medication.” *Vaughn*, 20 So. 3d at 653 (¶26) (emphasis added). However, the Court has not applied the “layman’s exception” to issues of medical causation. *Id.* at 653-54 (¶¶26-27) (“[D]iagnosing symptoms has been explicitly held by this Court to be outside of the realm of a lay person and an activity that requires a medical expert. Accordingly, Vaughn’s argument that lay-witness testimony can establish the element of proximate cause is without merit.”). In any event, the exception does not apply in this case because, without the assistance of expert testimony, a layman would have no basis for

distinguishing between the severe injuries that Tobias suffered when the forklift fell on his head and any new injury that he allegedly sustained when he fell in the hospital.

¶11. Tobias’s basic argument is that a layman could read his medical records and understand which, if any, injuries were caused by the fall in the hospital as opposed to the forklift accident. However, that simply is not the case. As explained above, according to Tobias’s medical records, the CT scan performed after his fall showed only the “expected evolution” of his original injuries. There is nothing in Tobias’s records, standing alone, that would permit a layman to draw any other inference. Therefore, this case is governed by the general rule that a medical malpractice plaintiff must establish the essential element of proximate causation through expert testimony. *Norman*, 262 So. 3d at 523 (¶12). Tobias failed to come forward with such testimony. Therefore, the circuit court properly granted UMMC’s motion for summary judgment.

CONCLUSION

¶12. Without an expert witness to prove proximate causation, Tobias could not prevail on his medical malpractice claim. The circuit court correctly granted summary judgment.

¶13. **AFFIRMED.**

**BARNES, C.J., CARLTON, P.J., GREENLEE, WESTBROOKS, TINDELL,
McDONALD, LAWRENCE, McCARTY AND C. WILSON, JJ., CONCUR.**